

APR 27 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

DANIEL WALTER CORCORAN,

Petitioner,

v.

DON HELLING,

Respondent.

No. 05-15359

D.C. No. CV-00-01539-PMP

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted April 6, 2006
San Francisco, California

Before: NOONAN, SILER^{**}, and BYBEE, Circuit Judges.

In evaluating whether Corcoran's trial counsel was ineffective for failing to file a notice of appeal, the Nevada Supreme Court applied only one-part of the required two-part test in *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000). Where

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

the state court fails to apply the appropriate standard, AEDPA's rule of deference does not apply and we review the question *de novo*. *Fernandez v. Roe*, 286 F.3d 1073, 1077 (9th Cir. 2002).

Corcoran's counsel had no constitutional duty to file a notice of appeal under *Roe v. Flores-Ortega* because there were no non-frivolous grounds for appeal and Corcoran did not reasonably demonstrate to his counsel that he was interested in appealing.

In Corcoran's second state petition for writ of habeas corpus, the Nevada Supreme Court affirmed the lower court finding that Corcoran's petition was untimely and that it failed to allege new or different grounds for relief as required by Nev. Rev. Stat. § 34.810. Corcoran has failed to demonstrate that his mental illness precluded him from filing a timely petition or raising all issues in his first habeas petition. Federal habeas is barred where the petitioner cannot "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). There are no underlying facts in dispute that need to be addressed in an evidentiary hearing.

AFFIRMED.